

# **UTAH UNIFORM SECURITIES ACT**

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Department of Commerce  
**Division of Securities**

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# UTAH UNIFORM SECURITIES ACT

## Section 61-1-1 et seq., UCA 1953, as amended

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### **61-1-1. Fraud unlawful.**

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

(1) employ any device, scheme, or artifice to defraud;

(2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

History: As last amended by Chapter 284, § 4, Laws of Utah 1983.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-1, R164-6, R164-10, R164-14.

Cross-References: Criminal Code, corporation frauds, § 76-10-701 et seq.

### **61-1-2. Investment adviser - Unlawful acts.**

(1) It is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise to:

(a) employ any device, scheme, or artifice to defraud the other person;

(b) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person; or

(c) divide or otherwise split any consideration with any person not licensed under this chapter as an investment advisor or investment adviser representative.

(2) (a) Except as may be permitted by rule of the division, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing that:

(i) the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(ii) no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and

(iii) the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

(b) Subsection 61-1-2(2)(a)(i) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date.

(c) "Assignment," as used in Subsection 61-1-2(2)(a)(ii), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor.

(d) If the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

(3) It is unlawful for any investment adviser to take or have custody of any securities or funds of any client if:

(a) the division by rule prohibits custody; or

(b) in the absence of a rule, the investment adviser fails to notify the division that he has or may have custody.

(4) The division may by rule adopt exemptions from Subsections 61-1-2(2)(a)(i), (ii), and (iii) where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this chapter.

History: As last amended by Chapter 158, § 1, Laws of Utah 1993.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-2.

### **61-1-3. Licensing of broker-dealers, agents, and investment advisers.**

(1) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless the person is licensed under this chapter.

(2) (a) It is unlawful for any broker-dealer or issuer to employ or engage an agent unless the agent is licensed. The license of an agent is not effective during any period when he is not associated with a particular broker-dealer licensed under this chapter or a particular issuer.

(b) When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the division.

(3) It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless:

(a) the person is licensed under this chapter; or

(b) the person's only clients in this state are investment companies as defined in the Investment Company Act of 1940, other investment advisers, federal covered advisers, broker-dealers, banks, trust companies, savings and loan associations, insurance companies, employee benefit plans with assets of not less than \$1,000,000, and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the director; or

(c) the person has no place of business in this state and during the preceding twelve-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

(4) (a) It is unlawful for any:

(i) person required to be licensed as an investment adviser under this chapter to employ an investment adviser representative unless the investment adviser representative is licensed under this chapter, provided that the license of an investment adviser representative is not effective during any period when the person is not employed by an investment adviser licensed under this chapter; or

(ii) federal covered adviser to employ, supervise, or associate with an investment adviser representative having a place of business located in this state, unless such investment adviser representative is licensed under this chapter or is exempt from licensing.

(b) When an investment adviser representative required to be licensed under this chapter begins or terminates employment with an investment adviser, the investment adviser shall promptly notify the division.

(5) Except with respect to investment advisers whose only clients are those described under Subsections (3)(b) or (3)(c), it is unlawful for any federal covered adviser to conduct advisory business in this state unless such person complies with the provisions of Section 61-1-4.

History: As last amended by Chapter 160, § 1, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-1.

Cross-References: Insurance companies, solicitations only by those registered under this chapter, § 31A-5-207; Sale of securities by authorized insurer, § 31A-5-206.

#### **61-1-4. Licensing and notice filing procedure.**

(1) (a) A broker-dealer, agent, investment adviser, or investment adviser representative must



obtain an initial or renewal license by filing with the division or its designee an application together with a consent to service of process under Section 61-1-26.

(b) (i) The application shall contain the applicant's social security number and whatever information the division by rule requires concerning such matters as:

(A) the applicant's form and place of organization;

(B) the applicant's proposed method of doing business;

(C) the qualifications and business history of the applicant; in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser;

(D) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and

(E) the applicant's financial condition and history.

(ii) An applicant's social security number is a private record under Subsection 63-2-302(1)(g).

(c) The division may, by rule or order, require an applicant for an initial license to publish an announcement of the application in one or more specified newspapers published in this state.

(d) Licenses or notice filings of broker-dealers, agents, investment advisers, and investment adviser representatives shall expire on December 31 of each year.

(e) (i) If no denial order is in effect and no proceeding is pending under Section 61-1-6, a license becomes effective at noon of the 30th day after an application is filed.

(ii) The division may by rule or order specify an earlier effective date and may by order defer the effective date until noon of the 30th day after the filing of any amendment.

(iii) Licensing of a broker-dealer automatically constitutes licensing of only one partner, officer, director, or a person occupying a similar status or performing similar functions as a licensed agent of the broker-dealer.

(iv) Licensing of an investment adviser automatically constitutes licensing of only one partner, officer, director, or a person occupying a similar status or performing similar functions.

(2) Except with respect to federal covered advisers whose only clients are those described in Subsection 61-1-3(3)(b) or (c), a federal covered adviser shall file with the division, prior to acting as a federal covered adviser in this state, a notice filing consisting of such documents as have been filed with the Securities and Exchange Commission as the division by rule or order may require.

(3) (a) Any applicant for an initial or renewal license as a broker-dealer or agent shall pay a reasonable filing fee as determined under Section 61-1-18.4.

(b) Any applicant for an initial or renewal license as an investment adviser or investment adviser representative who is subject to licensing under this chapter shall pay a reasonable filing fee as determined under Section 61-1-18.4.

(c) Any person acting as a federal covered adviser in this state shall pay an initial and renewal notice filing fee as determined under Section 61-1-18.4.

(d) If the license or renewal is not granted or the application is withdrawn, the division shall retain the fee.

(4) A licensed broker-dealer or investment adviser may file an application for licensing of a successor for the unexpired portion of the year. There shall be no filing fee.

(5) The division may by rule or order require a minimum capital for licensed broker-dealers, subject to the limitations of Section 15 of the Securities Exchange Act of 1934, and establish minimum financial requirements for investment advisers, subject to the limitations of Section 222 of the Investment Advisers Act of 1940, which may include different requirements for those investment advisers who maintain custody of or have discretionary authority over client funds or securities and those investment advisers who do not.

(6) (a) The division may by rule or order require licensed broker-dealers and investment advisers who have custody of or discretionary authority over client funds or securities to post bonds in amounts as the division may prescribe, subject to the limitations of Section 15 of the Securities Exchange Act of 1934 for broker-dealers and Section 222 of the Investment Advisers Act of 1940 for investment advisers, and may determine their conditions.

(b) Any appropriate deposit of cash or securities may be accepted in lieu of any required bond.

(c) No bond may be required of any licensee whose net capital, or in the case of an investment adviser whose minimum financial requirements, which may be defined by rule, exceeds the amounts required by the division.

(d) Every bond shall provide for suit on the bond by any person who has a cause of action

under Section 61-1-22 and, if the division by rule or order requires, by any person who has a cause of action not arising under this chapter.

(e) Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first.

History: As last amended by Chapter 160, § 2 and Chapter 232, § 24, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-4, R164-18.

### **61-1-5. Postlicensing provisions.**

(1) (a) Every licensed broker-dealer and investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the division by rule prescribes, except as provided in Section 15 of the Securities Exchange Act of 1934 in the case of a broker-dealer and Section 222 of the Investment Advisers Act of 1940 in the case of an investment adviser.

(b) All required records regarding an investment adviser shall be preserved for the period as the division prescribes by rule or order.

(2) (a) Every licensed broker-dealer shall, within 24 hours after demand, furnish to any customer or principal for whom the broker-dealer has executed any order for the purchase or sale of any securities, either for immediate or future delivery, a written statement showing the time when, the place where, and the price at which the securities were bought and sold.

(b) With respect to investment advisers, the division may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients.

(c) To the extent determined by the director, information furnished to clients or prospective clients of an investment adviser who would be in compliance with the Investment Advisers Act of 1940 and the rules thereunder may be deemed to satisfy this requirement.

(3) Every licensed broker-dealer and investment adviser shall file financial reports as the division by rule prescribes, except as provided in Section 15 of the Securities Exchange Act of 1934 in the case of a broker-dealer and Section 222 of the Investment Advisers Act of 1940 in the case of an investment adviser.

(4) If the information contained in any document filed with the division is or becomes inaccurate or incomplete in any material respect, the licensee or federal covered adviser shall promptly file a correcting amendment if the document is filed with respect to a licensee, or when such amendment is

required to be filed with the Securities and Exchange Commission if the document is filed with respect to a federal covered adviser, unless notification of the correction has been given under Section 61-1-3.

(5) (a) All the records referred to in Subsection (1) are subject at any time or from time to time to reasonable periodic, special, or other examinations by representatives of the division, within or without this state, as the division deems necessary or appropriate in the public interest or for the protection of investors.

(b) For the purpose of avoiding unnecessary duplication of examination, the division may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and national securities exchanges or national securities associations registered under the Securities Exchange Act of 1934.

History: As last amended by Chapter 160, § 3, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-4, R164-5, R164-6.

#### **61-1-6. Denial, suspension, revocation, cancellation, or withdrawal of license.**

(1) Subject to the requirements of Subsections (2) and (3), the director, by means of adjudicative proceedings conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act, may issue an order:

(a) denying, suspending, or revoking any license;

(b) barring or censuring any licensee or any officer, director, partner, or person occupying a similar status or performing similar functions for a licensee from employment with a licensed broker-dealer or investment adviser;

(c) restricting or limiting a licensee as to any function or activity of the business for which a license is required in this state;

(d) imposing a fine; or

(e) any combination of Subsections (1)(a) through (d).

(2) The director may impose the sanctions in Subsection (1) if the director finds that it is in the public interest and finds, with respect to the applicant or licensee or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser, that the person:

(a) has filed an application for a license that, as of its effective date or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement that was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act;

(c) was convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;

(d) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;

(e) is the subject of an order of the director or any predecessor denying, suspending, or revoking license as a broker-dealer, agent, investment adviser, or investment adviser representative;

(f) is the subject of:

(i) an adjudication or determination, within the past five years by a securities or commodities agency or administrator of another state, Canadian province or territory, or a court of competent jurisdiction that the person has willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or the securities or commodities law of any other state; or

(ii) an order entered within the past five years by the securities administrator of any state or Canadian province or territory or by the Securities and Exchange Commission denying or revoking license as a broker-dealer, agent, investment adviser, or investment adviser representative or the substantial equivalent of those terms or is the subject of an order of the Securities and Exchange Commission suspending or expelling the person from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States post office fraud order; except that

(iii) the division may not commence agency action to revoke or suspend any license under Subsection (2)(f) more than one year from the date of the order relied on, and the director may not enter an order under Subsection (2)(f) on the basis of an order under another state's law unless that order was based on facts that would currently constitute a ground for an agency action under this section;

(g) has engaged in dishonest or unethical practices in the securities business;

(h) is insolvent, either in the sense that liabilities exceed assets or in the sense that obligations cannot be met as they mature, except that the director may not enter an order against a broker-dealer or investment adviser under this Subsection (2)(h) without a finding of insolvency as to the broker-dealer or investment adviser;

(i) is not qualified on the basis of the lack of training, experience, and knowledge of the securities business, except as otherwise provided in Subsection (5);

(j) has failed reasonably to supervise his agents or employees if the person is a broker-dealer, or his investment adviser representatives or employees if the person is an investment adviser; or

(k) has failed to pay the proper filing fee within 30 days after being notified by the division of a deficiency.

(3) Before the director may issue an order under Subsection (1) that: revokes any license; bars or censures any licensee or any officer, director, partner, or person occupying a similar status or performing similar functions for a licensee from employment with a licensed broker-dealer or investment adviser; or imposes a fine, the Securities Advisory Board shall:

(a) review the order; and

(b) if a majority of the Securities Advisory Board approves the order, authorize the director to issue it.

(4) The division may enter a denial order under Subsection (2)(j) or (k), but shall vacate the order when the deficiency has been corrected.

(5) The division may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to it when the license became effective unless the proceeding is instituted within the next 120 days.

(6) The following provisions govern the application of Subsection (2)(i):

(a) The director may not enter an order against a broker-dealer on the basis of the lack of qualification of any person other than:

(i) the broker-dealer himself if he is an individual; or

(ii) an agent of the broker-dealer.

(b) The director may not enter an order against an investment adviser on the basis of the lack of

qualification of any person other than:

- (i) the investment adviser himself if he is an individual; or
- (ii) an investment adviser representative.

(c) The director may not enter an order solely on the basis of lack of experience if the applicant or licensee is qualified by training or knowledge.

(d) The director shall consider that an agent who will work under the supervision of a licensed broker-dealer need not have the same qualifications as a broker-dealer and that an investment adviser representative who will work under the supervision of a licensed investment adviser need not have the same qualifications as an investment adviser.

(e) (i) The director shall consider that an investment adviser is not necessarily qualified solely on the basis of experience as a broker-dealer or agent.

(ii) When the director finds that an applicant for a license as a broker-dealer is not qualified as an investment adviser, the director may condition the applicant's license as a broker-dealer upon the applicant's not transacting business in this state as an investment adviser.

(f) (i) The division may by rule provide for examinations, which may be written or oral or both, to be taken by any class of or all applicants.

(ii) The division may by rule or order waive the examination requirement as to a person or class of persons if the division determines that the examination is not necessary for the protection of investors.

(7) If the director finds that any licensee or applicant for a license is no longer in existence, has ceased to do business as a broker-dealer, agent, investment adviser, or investment adviser representative, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the division may summarily cancel or deny the license or application according to the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.

(8) (a) Withdrawal from license as a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective 30 days after receipt of an application to withdraw or within a shorter period of time as determined by the director, unless:

- (i) a revocation or suspension proceeding is pending when the application is filed;

(ii) a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days after the application is filed; or

(iii) additional information is requested by the division regarding the withdrawal application.

(b) (i) If a proceeding described in Subsection (7) is pending or instituted, the director shall designate by order when and under what conditions the withdrawal becomes effective.

(ii) If additional information is requested, withdrawal is effective 30 days after the additional information is filed.

(c) (i) If no proceeding is pending or instituted, and withdrawal automatically becomes effective, the director may initiate a revocation or suspension proceeding under this section within one year after withdrawal became effective.

(ii) The director shall enter any order under Subsection (2)(b) as of the last date on which the license was effective.

History: As last amended by Chapter 36, Laws of Utah 2003.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-4, R164-6, R164-14, R164-18.

#### **61-1-6.5. Court-ordered discipline.**

The division shall promptly withhold, suspend, restrict, or reinstate the use of a license issued under this chapter if so ordered by a court.

History: As enacted by Chapter 232, § 25, Laws of Utah 1997.

#### **61-1-7. Registration before sale.**

It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter, the security or transaction is exempted under Section 61-1-14, or the security is a federal covered security for which a notice filing has been made pursuant to the provisions of Section 61-1-15.5.

History: As last amended by Chapter 160, § 4, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-14.

#### **61-1-8. Registration by notification.**

(1) The following securities may be registered by notification, whether or not they are also eligible for registration by coordination under Section 61-1-9:



(a) any security whose issuer and any predecessors have been in continuous operation for at least five years if there has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer, or any predecessor, with a fixed maturity or a fixed interest or dividend provision, and the issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting principles:

(i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed and equal to at least 5% of the amount of such outstanding securities, as measured by the maximum offering price or the market price on a day, selected by the registrant, within 30 days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within 90 days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price; or

(ii) which, if the issuer and any predecessors have not had any security of the type specified in Subsection (1)(a)(i) outstanding for three full fiscal years, equal to at least 5% of the amount, as measured in Subsection (1)(a)(i), of all securities which will be outstanding if all the securities being offered or proposed to be offered, whether or not they are proposed to be registered or offered in this state, are issued;

(b) any security, other than a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, registered for nonissuer distribution if any security of the same class has ever been registered under this chapter or a predecessor act, or the security being registered was originally issued pursuant to an exemption under this chapter or a predecessor act.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Section 61-1-26:

(a) a statement demonstrating eligibility for registration by notification;

(b) with respect to the issuer and any significant subsidiary:

(i) its name, address, and form of organization;

(ii) the state or foreign jurisdiction and the date of its organization; and

(iii) the general character and location of its business;

(c) with respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution:

(i) his name and address;

(ii) the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and

(iii) a statement of his reasons for making the offering;

(d) a description of the security being registered;

(e) the information and documents specified in clauses (h), (i), and (j) of Subsection 61-1-10(2); and

(f) in the case of any registration under Subsection 61-1-8(1)(b) which does not also satisfy the conditions of Subsection 61-1-8(1)(a):

(i) a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; and

(ii) a summary of earnings for each of the two fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than two years.

(3) If no stop order is in effect and no proceeding is pending under Section 61-1-12, a registration statement under this section automatically becomes effective at 3 p.m. Mountain Standard Time of the second full working day after the filing of the registration statement or the last amendment, or at such earlier time as the division determines.

History: As last amended by Chapter 161, § 5, Laws of Utah 1991.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-18.

#### **61-1-9. Registration by coordination.**

(1) Any security for which a registration statement or a notification under Regulation A or any successor to Regulation A has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Section 61-1-26:

(a) One copy of the disclosure statement together with all its amendments filed under the Securities Act of 1933;

(b) If the division by rule or otherwise requires, a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered and a specimen or copy of the security;

(c) If the division requests, any other information, or copies of any other documents, filed under the Securities Act of 1933; and

(d) An undertaking to forward all future amendments to the disclosure statement promptly and in any event not later than the first working day after the day they are forwarded to or filed with the Securities and Exchange Commission, whichever first occurs.

(3) A registration statement under this section automatically becomes effective at the moment the disclosure statement becomes effective if all the following conditions are satisfied:

(a) no stop order is in effect and no proceeding is pending under Section 61-1-12;

(b) the disclosure statement has been on file with the division for at least ten working days; and

(c) a statement of the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions has been on file for two full working days or such shorter period as the division permits by rule or otherwise and the offering is made within those limitations.

(4) (a) The registrant shall promptly notify the division by telephone or telegram of the date and time when the disclosure statement became effective and the content of the price amendment, if any, and shall promptly file a posteffective amendment containing the information and documents in the price amendment.

(b) "Price amendment" means the final federal amendment which includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

(5) (a) Upon failure to receive the required notification and posteffective amendment with respect to the price amendment, the division may enter a stop order, without notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with Subsection (4), if it promptly notifies the registrant by telephone or telegram and promptly confirms by letter or telegram when it notifies by telephone of the issuance of the order.

(b) If the registrant proves compliance with the requirements of Subsection (4) as to notice and posteffective amendment, the stop order is void as of the time of its entry.

(6) The division may by rule or otherwise waive either or both of the conditions specified in Subsections (3)(b) and (3)(c).

(7) If the disclosure statement becomes effective before all the conditions in Subsections (3)(b) and (3)(c) are satisfied and they are not waived, the disclosure statement automatically becomes effective as soon as all the conditions are satisfied.

(8) If the registrant advises the division of the date when the disclosure statement is expected to become effective, the division shall promptly advise the registrant by telephone or telegram, at the registrant's expense, whether all the conditions are satisfied and whether it then contemplates the institution of proceedings under Section 61-1-12, but this advice by the division does not preclude the institution of such a proceeding at any time.

(9) The division may by rule or order permit registration by coordination of any security for which a notification or similar document has been filed under the Securities Act of 1933 in connection with the same offering.

History: As last amended by Chapter 161, § 6, Laws of Utah 1991.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-9, R164-14, R164-18.

#### **61-1-10. Registration by qualification.**

(1) Application may be made to register any security by qualification.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Section 61-1-26:

(a) with respect to the issuer and any significant subsidiary:

(i) its name, address, and form of organization;

(ii) the state or foreign jurisdiction and date of its organization;

(iii) the general character and location of its business;

(iv) a description of its physical properties and equipment; and

(v) a statement of the general competitive conditions in the industry or business in which it is

or will be engaged;

(b) with respect to every director and officer of the issuer or person occupying a similar status or performing similar functions:

(i) his name, address, and principal occupation for the past five years;

(ii) the amount of securities of the issuer held by him as of a specified date within 30 days of the filing of the registration statement;

(iii) the amount of the securities covered by the registration statement to which he has indicated his intention to subscribe; and

(iv) a description of any material interest in any material transaction with the issuer or any significant subsidiary affected within the past three years or proposed to be affected;

(c) with respect to persons covered by Subsection (b), the remuneration paid during the past 12 months and estimated to be paid during the next 12 months, directly or indirectly, by the issuer, together with all predecessors, parents, subsidiaries, and affiliates, to all those persons in the aggregate;

(d) with respect to any person owning of record, or beneficially if known, 10% or more of the outstanding shares of any class of equity security of the issuer, the information specified in Subsection (b) other than the person's occupation;

(e) with respect to every promoter if the issuer was organized within the past three years, the information specified in Subsection (b), any amount paid to the promoter within that period or intended to be paid to the promoter, and the consideration for any such payment;

(f) with respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution:

(i) the person's name and address;

(ii) the amount of securities of the issuer held by the person as of the date of filing of the registration statement;

(iii) a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected; and

(iv) a statement of the person's reasons for making the offering;

(g) the capitalization and long-term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else, for which the issuer or any subsidiary has issued any of its securities within the past two years or is obligated to issue any of its securities;

(h) (i) the kind and amount of securities to be offered;

(ii) the proposed offering price or the method by which it is to be computed;

(iii) any variation therefrom at which any proportion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class;

(iv) the basis upon which the offering is to be made if otherwise than for cash;

(v) the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering, or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts;

(vi) the estimated amounts of other selling expenses, including legal, engineering, and accounting charges;

(vii) the name and address of every underwriter and every recipient of a finder's fee;

(viii) a copy of any underwriting or selling-group agreement under which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and

(ix) a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(i) (i) the estimated cash proceeds to be received by the issuer from the offering;

(ii) the purposes for which the proceeds are to be used by the issuer;

(iii) the amount to be used for each purpose;

(iv) the order or priority in which the proceeds will be used for the purposes stated;

(v) the amounts of any funds to be raised from other sources to achieve the purposes

stated; the sources of any such funds; and

(vi) if any part of the proceeds is to be used to acquire any property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition, including the cost of borrowing money to finance the acquisition;

(j) a description of any stock options or other security options outstanding, or to be created in connection with the offering, together with the amount of any such option held or to be held by every person required to be named in clause (b), (d), (e), (f), or (h) and by any person who holds or will hold 10% or more in the aggregate of any such options;

(k) (i) the dates of, parties to, and general effect concisely stated of, every management or other material contract made or to be made otherwise than in the ordinary course of business if it is to be performed in whole or in part at or after the filing of the registration statement or was made within the past two years, together with a copy of every such contract; and

(ii) a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets, including any such litigation or proceeding known to be contemplated by governmental authorities;

(l) a copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering;

(m) (i) a specimen copy of the security being registered;

(ii) a copy of the issuer's articles of incorporation, and bylaws, if any, or their substantial equivalents, as currently in effect; and

(iii) a copy of any indenture or other instrument covering the security to be registered;

(n) a signed or conformed copy of an opinion of counsel as to the legality of the security being registered, with an English translation if it is in a foreign language, which shall state whether the security when sold will be legally issued, fully paid, and nonassessable, and if a debt security, a binding obligation of the issuer;

(o) the written consent of any accountant, engineer, appraiser, or other person whose profession gives authority to a statement made by him, if that person is named as having prepared or certified a report or valuation, other than a public and official document or statement, which is used in connection with the registration statement;

(p) (i) a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement;

(ii) a profit and loss statement and analysis of retained earnings for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than three years; and

(iii) if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if that business were the registrant; and

(q) such additional information or verification of any statement as the division requires by rule or order.

(3) A registration statement under this section becomes effective when the division so orders.

(4) As a condition of registration under this section, a prospectus containing the information, but not containing copies of contracts or agreements specified in Subsections (2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (p) shall be sent or given to each person to whom an offer is made before or concurrently with:

(a) the first written offer made to the person, otherwise than by means of a public advertisement, by or for the account of the issuer or any other person on whose behalf the offering is being made, or by any underwriter or broker-dealer who is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(b) the confirmation of any sale made by or for the account of any such person;

(c) payment pursuant to any such sale; or

(d) delivery of the security pursuant to any such sale, whichever occurs first.

History: As last amended by Chapter 161, § 7, Laws of Utah 1991.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-10, R164-18.

### **61-1-11. Provisions applicable to registration generally.**

(1) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a licensed broker-dealer.

(2) Every person filing a registration statement shall pay a filing fee as determined under Section 61-1-18.4.



(3) Every registration statement shall specify:

(a) the amount of securities to be offered in this state;

(b) the states in which a registration statement or similar document in connection with the offering has been or is to be filed; and

(c) any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the Securities and Exchange Commission.

(4) Any document filed under this chapter or a predecessor act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the document is currently accurate.

(5) The division may permit the omission of any item of information or document from any registration statement.

(6) In the case of a nonissuer distribution, information may not be required under Section 61-1-10 or Subsection 61-1-11(9) unless it is known to the person filing the registration statement or to the persons on whose behalf the distribution is to be made, or can be furnished by them without unreasonable effort or expense.

(7) (a) The division may require as a condition of registration by qualification or coordination:

(i) that any security issued within the past three years or to be issued to a promoter for a consideration substantially different from the public offering price, or to any person for a consideration other than cash, be deposited in escrow; and

(ii) that the proceeds from the sale of the registered security be impounded until the issuer receives a specified amount from the sale of the security either in this state or elsewhere.

(b) The division may determine the conditions of any escrow or impounding required by this subsection, but it may not reject a depository solely because of location in another state.

(8) (a) Every registration statement is effective for one year from its effective date.

(b) All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction:

(i) so long as the registration statement is effective; and

(ii) between the 30th day after the entry of any stop order suspending or revoking the effectiveness of the registration statement under Section 61-1-12, if the registration statement did not relate in whole or in part to a nonissuer distribution, and one year from the effective date of the registration statement.

(c) A registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding.

(d) A registration statement may be withdrawn otherwise only in the discretion of the division.

(9) So long as a registration statement is effective and the offering is not completely sold, the division may require the person who filed the registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the registration statement and to disclose the progress of the offering.

(10) (a) A registration statement may be amended after its effective date so as to increase the securities specified to be offered and sold, if the public offering price and underwriters' discounts and commissions are not changed from the respective amounts of which the division was informed.

(b) The amendment becomes effective when the division so orders.

(c) Every person filing an amendment shall pay a registration fee as determined under Section 61-1-18.4 with respect to the additional securities proposed to be offered.

(d) The amendment relates back to the date of the sale of the additional security being registered, provided that within six months of the date of the sale the amendment is filed and the additional registration fee is paid.

(11) (a) Except as otherwise provided in Subsection (b), an issuer may only employ or engage an agent to effect or attempt to effect transactions in its securities who is licensed under this chapter and associated with a licensed broker-dealer.

(b) A partner, officer, or director of an issuer, or a person occupying a similar status or performing similar functions, may act as an agent of the issuer to effect or attempt to effect transactions in its securities, provided the person is licensed under this chapter and receives no commission or other remuneration, directly or indirectly, for effecting or attempting to effect the transactions.

(12) (a) Any security that is offered or sold under Section 4(5) of the Securities Act of 1933 or that is a "mortgage related security" as defined in Section 3(a)(41) of the Securities Exchange Act of 1934 shall not be exempt under Subsection 61-1-14(1)(a) to the same extent as any obligation issued by or guaranteed as to principal and interest by the United States or an agency or instrumentality of the

United States. Accordingly, any such security shall comply with the applicable registration and qualification requirements set forth in this chapter.

(b) This subsection specifically overrides the preemption of state law contained in Section 106(c) of the Secondary Mortgage Market Enhancement Act of 1984, Public Law Number 98-440.

History: As last amended by Chapter 12, § 69, Laws of Utah 1994.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-10, R164-11, R164-18.

Cross-References: False corporate reports as crime, § 76-10-707.

#### **61-1-11.1. Hearings for certain exchanges of securities.**

(1) An application may be made to the division for approval to issue securities or to deliver other consideration in exchange for:

(a) one or more bona fide outstanding securities, claims, or property interests; or

(b) partly in exchange for one or more bona fide outstanding securities, claims, or property interests, and partly for cash.

(2) The director may:

(a) hold a hearing upon the fairness of the terms and conditions of an exchange described in Subsection (1); and

(b) approve or disapprove the terms and conditions of an exchange described in Subsection (1).

(3) After conducting a hearing under this section, if the director finds that the terms and conditions of an exchange described in Subsection (1) are fair to those to whom the securities will be issued, the director may:

(a) approve the fairness of the terms and conditions of the exchange described in Subsection (1); and

(b) approve the exchange described in Subsection (1).

(4) In a hearing under this section, all persons to whom it is proposed to issue securities or to deliver other consideration in an exchange under Subsection (1) may appear.

(5) An application under Subsection (1) shall contain the information and be accompanied by the documents required by rule or order of the division.

(6) Every person filing an application under Subsection (1) shall pay a filing fee as determined under Section 61-1-18.4.

(7) An applicant under this section shall provide adequate notice of any hearing under this section to all persons that have a right to appear, under Subsection (4), at the hearing.

(8) An application may be made under this section regardless of whether the security or transaction being issued is:

(a) exempt from registration; or

(b) not required to be registered.

(9) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division may establish rules to govern the conduct of a hearing permitted by this section.

(10) This section is intended to provide for a fairness hearing that satisfies the requirements of Section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. Section 77c(a)(10), or any comparable section that may subsequently be enacted.

History: Enacted by Chapter 245, Laws of Utah 2003

#### **61-1-12. Denial, suspension, and revocation of registration.**

(1) Upon approval by a majority of the Securities Advisory Board, the director, by means of adjudicative proceedings conducted in accordance with Title 63, Chapter 46b, the Administrative Procedures Act, may issue a stop order that denies effectiveness to, or suspends or revokes the effectiveness of, any securities registration statement and may impose a fine if he finds that the order is in the public interest and that:

(a) the registration statement, as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under Subsection 61-1-11(10) as of its effective date, or any report under Subsection 61-1-11(9), is incomplete in any material respect, or contains any statement that was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) any provision of this chapter, or any rule, order, or condition lawfully imposed under this chapter, has been willfully violated, in connection with the offering, by:

(i) the person filing the registration statement;

(ii) the issuer, any partner, officer, or director of the issuer, any person occupying a similar

status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or

(iii) any underwriter;

(c) the security registered or sought to be registered is the subject of an administrative stop order or similar order, or a permanent or temporary injunction of any court of competent jurisdiction entered under any other federal or state act applicable to the offering; except that the division may not commence agency action against an effective registration statement under this subsection more than one year from the date of the order or injunction relied on, and it may not enter an order under this subsection on the basis of an order or injunction entered under the securities act of any other state unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section;

(d) the issuer's enterprise or method of business includes or would include activities that are illegal where performed;

(e) the offering has worked or tended to work a fraud upon purchasers or would so operate;

(f) the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options;

(g) when a security is sought to be registered by notification, it is not eligible for such registration;

(h) when a security is sought to be registered by coordination, there has been a failure to comply with the undertaking required by Subsection 61-1-9(2)(d); or

(i) the applicant or registrant has failed to pay the proper filing fee.

(2) The director may enter an order under this section but may vacate the order if he finds that the conditions that prompted its entry have changed or that it is otherwise in the public interest to do so.

(3) The director may not issue a stop order against an effective registration statement on the basis of a fact or transaction known to the division when the registration statement became effective unless the proceeding is instituted within the next 120 days.

(4) No person may be considered to have violated Section 61-1-7 or 61-1-15 by reason of any order or sale effected after the entry of an order under this section if that person proves by a

preponderance of the evidence that he did not know, and in the exercise of reasonable care could not have known, of the order.

History: As last amended by Chapter 133, § 6, Laws of Utah 1990.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-10, R164-18.

### **61-1-13. Definitions.**

As used in this chapter:

(1) "Affiliate" means a person that, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with a person specified.

(2) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents:

(a) an issuer, who receives no commission or other remuneration, directly or indirectly, for effecting or attempting to effect purchases or sales of securities in this state, and who:

(i) effects transactions in securities exempted by Subsection 61-1-14 (1)(a), (b), (c), (i), or (j);

(ii) effects transactions exempted by Subsection 61-1-14 (2);

(iii) effects transactions in a covered security as described in Sections 18(b)(3) and 18(b)(4)(D) of the Securities Act of 1933; or

(iv) effects transactions with existing employees, partners, officers, or directors of the issuer; or

(b) a broker-dealer in effecting transactions in this state limited to those transactions described in Section 15(h)(2) of the Securities Exchange Act of 1934. A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition.

(3) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include:

(a) an agent;

(b) an issuer;

- (c) a bank, savings institution, or trust company;
  - (d) a person who has no place of business in this state if:
    - (i) the person effects transactions in this state exclusively with or through:
      - (A) the issuers of the securities involved in the transactions;
      - (B) other broker-dealers; or
      - (C) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or
    - (ii) during any period of 12 consecutive months the person does not direct more than 15 offers to sell or buy into this state in any manner to persons other than those specified in Subsection (3)(d)(i), whether or not the offeror or any of the offerees is then present in this state;
  - (e) a general partner who organizes and effects transactions in securities of three or fewer limited partnerships, of which the person is the general partner, in any period of 12 consecutive months;
  - (f) a person whose participation in transactions in securities is confined to those transactions made by or through a broker-dealer licensed in this state;
  - (g) a person who is a real estate broker licensed in this state and who effects transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed or trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;
  - (h) a person effecting transactions in commodity contracts or commodity options; or
  - (i) other persons as the division, by rule or order, may designate, consistent with the public interest and protection of investors, as not within the intent of this subsection.
- (4) "Buy" or "purchase" means every contract for purchase of, contract to buy, or acquisition of a security or interest in a security for value.
- (5) "Commodity" means, except as otherwise specified by the division by rule:
- (a) any agricultural, grain, or livestock product or byproduct, except real property or any

timber, agricultural, or livestock product grown or raised on real property and offered or sold by the owner or lessee of the real property;

(b) any metal or mineral, including a precious metal, except a numismatic coin whose fair market value is at least 15% greater than the value of the metal it contains;

(c) any gem or gemstone, whether characterized as precious, semi-precious, or otherwise;

(d) any fuel, whether liquid, gaseous, or otherwise;

(e) any foreign currency; and

(f) all other goods, articles, products, or items of any kind, except any work of art offered or sold by art dealers, at public auction or offered or sold through a private sale by the owner of the work.

(6) "Commodity contract" means any account, agreement, or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise.

(a) Any commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes.

(b) (i) A commodity contract shall not include any contract or agreement which requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(ii) The purchaser is not considered to have received physical delivery of the total amount of each commodity to be purchased under the contract or agreement when the commodity or commodities are held as collateral for a loan or are subject to a lien of any person when the loan or lien arises in connection with the purchase of each commodity or commodities.

(7) (a) "Commodity option" means any account, agreement, or contract giving a party to the option the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or both whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise.

(b) It does not include an option traded on a national securities exchange registered with the



United States Securities and Exchange Commission or on a board of trade designated as a contract market by the Commodity Futures Trading Commission.

(8) "Director" means the director of the Division of Securities charged with the administration and enforcement of this chapter.

(9) "Division" means the Division of Securities established by Section 61-1-18.

(10) "Executive director" means the executive director of the Department of Commerce.

(11) "Federal covered adviser" means a person who is registered under Section 203 of the Investment Advisers Act of 1940 or is excluded from the definition of "investment adviser" under Section 202(a)(11) of the Investment Advisers Act of 1940.

(12) "Federal covered security" means any security that is a covered security under Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated thereunder.

(13) "Fraud," "deceit," and "defraud" are not limited to their common-law meanings.

(14) "Guaranteed" means guaranteed as to payment of principal or interest as to debt securities, or dividends as to equity securities.

(15) (a) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

(b) "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation.

(c) "Investment adviser" does not include:

(i) an investment adviser representative;

(ii) a bank, savings institution, or trust company;

(iii) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession;

(iv) a broker-dealer or its agent whose performance of these services is solely incidental to the conduct of its business as a broker-dealer and who receives no special compensation for them;

(v) a publisher of any bona fide newspaper, news column, news letter, news magazine, or business or financial publication or service, of general, regular, and paid circulation, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;

(vi) any person who is a federal covered adviser; or

(vii) such other persons not within the intent of Subsection (15) as the division may by rule or order designate.

(16) "Investment adviser representative" means any partner, officer, director of, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who:

(a) (i) is employed by or associated with an investment adviser who is licensed or required to be licensed under this chapter; or

(ii) has a place of business located in this state and is employed by or associated with a federal covered adviser; and

(b) does any of the following:

(i) makes any recommendations or otherwise renders advice regarding securities;

(ii) manages accounts or portfolios of clients;

(iii) determines which recommendation or advice regarding securities should be given;

(iv) solicits, offers, or negotiates for the sale of or sells investment advisory services; or

(v) supervises employees who perform any of the foregoing.

(17) (a) "Issuer" means any person who issues or proposes to issue any security or has outstanding a security that it has issued.

(b) With respect to a preorganization certificate or subscription, "issuer" means the promoter or the promoters of the person to be organized.

(c) With respect to:

(i) interests in trusts, including but not limited to collateral trust certificates, voting trust certificates, and certificates of deposit for securities; or

(ii) shares in an investment company without a board of directors, "issuer" means the person or persons performing the acts and assuming duties of a depositor or manager under the provisions of the trust or other agreement or instrument under which the security is issued.

(d) With respect to an equipment trust certificate, a conditional sales contract, or similar securities serving the same purpose, "issuer" means the person by whom the equipment or property is to be used.

(e) With respect to interests in partnerships, general or limited, "issuer" means the partnership itself and not the general partner or partners.

(f) With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payment out of production under the titles or leases, "issuer" means the owner of the title or lease or right of production, whether whole or fractional, who creates fractional interests therein for the purpose of sale.

(18) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(19) "Person" means an individual, a corporation, a partnership, a limited liability company, an association, a joint-stock company, a joint venture, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(20) "Precious metal" means the following, whether in coin, bullion, or other form:

(a) silver;

(b) gold;

(c) platinum;

(d) palladium;

(e) copper; and

(f) such other substances as the division may specify by rule.

(21) "Promoter" means any person who, acting alone or in concert with one or more persons, takes initiative in founding or organizing the business or enterprise of a person.

(22) (a) "Sale" or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

(b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(c) The following are examples of the definitions in Subsections (22)(a) and (b):

(i) any security given or delivered with or as a bonus on account of any purchase of a security or any other thing, is part of the subject of the purchase, and has been offered and sold for value;

(ii) a purported gift of assessable stock is an offer or sale as is each assessment levied on the stock;

(iii) an offer or sale of a security that is convertible into, or entitles its holder to acquire or subscribe to another security of the same or another issuer is an offer or sale of that security, and also an offer of the other security, whether the right to convert or acquire is exercisable immediately or in the future;

(iv) any conversion or exchange of one security for another shall constitute an offer or sale of the security received in a conversion or exchange, and the offer to buy or the purchase of the security converted or exchanged;

(v) securities distributed as a dividend wherein the person receiving the dividend surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or sale;

(vi) a dividend of a security of another issuer is an offer or sale; or

(vii) the issuance of a security under a merger, consolidation, reorganization, recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the security issued as well as the offer to buy or the purchase of any security surrendered in connection therewith, unless the sole purpose of the transaction is to change the issuer's domicile.

(d) The terms defined in Subsections (22)(a) and (b) do not include:

(i) a good faith gift;

- (ii) a transfer by death;
- (iii) a transfer by termination of a trust or of a beneficial interest in a trust;
- (iv) a security dividend not within Subsection (22)(c)(v) or (vi);
- (v) a securities split or reverse split; or
- (vi) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash.

(23) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal statutes of those names as amended before or after the effective date of this chapter.

(24) (a) "Security" means any:

- (i) note;
- (ii) stock;
- (iii) treasury stock;
- (iv) bond;
- (v) debenture;
- (vi) evidence of indebtedness;
- (vii) certificate of interest or participation in any profit-sharing agreement;
- (viii) collateral-trust certificate;
- (ix) preorganization certificate or subscription;
- (x) transferable share;
- (xi) investment contract;
- (xii) burial certificate or burial contract;

(xiii) voting-trust certificate;

(xiv) certificate of deposit for a security;

(xv) certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease;

(xvi) commodity contract or commodity option;

(xvii) interest in a limited liability company;

(xviii) viatical settlement interest; or

(xix) in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

(b) "Security" does not include any:

(i) insurance or endowment policy or annuity contract under which an insurance company promises to pay money in a lump sum or periodically for life or some other specified period; or

(ii) interest in a limited liability company in which the limited liability company is formed as part of an estate plan where all of the members are related by blood or marriage, there are five or fewer members, or the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company. Evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company.

(25) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(26)(a) "Viatical settlement interest" means the entire interest or any fractional interest in any of the following that is the subject of a viatical settlement:

(i) a life insurance policy; or

(ii) the death benefit under a life insurance policy.

(b) "Viatical settlement interest" does not include the initial purchase from the viator by a

provider of viatical settlements.

(27) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive of legal holidays listed in Section 63-13-2.

(28) A term not defined in Section 61-1-13 shall have the meaning as established by division rule. The meaning of a term neither defined in this section nor by rule of the division shall be the meaning commonly accepted in the business community.

History: As last amended by Chapter 81, Laws of Utah 2003.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-18.

#### **61-1-14. Exemptions.**

(1) The following securities are exempted from Sections 61-1-7 and 61-1-15:

(a) any security, including a revenue obligation, issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing, or any certificate of deposit for any of the foregoing;

(b) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any Canadian province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(c) any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company supervised under the laws of any state;

(d) any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this state;

(e) any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of this state;

(f) any security issued or guaranteed by any public utility or holding company which is a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act, or any security regulated in respect of its rates or in its issuance by a governmental authority of the United States, any state, Canada, or any Canadian province;

(g) any security listed on the National Association of Securities Dealers Automated Quotation National Market System, the New York Stock Exchange, the American Stock Exchange, or on any other stock exchange or medium approved by the division, except that the director may at any time suspend or revoke this exemption for any particular stock exchange, medium, security, or securities under Subsection (4); any other security of the same issuer which is of senior or substantially equal rank to any security so listed and approved by the director, any security called for by subscription rights or warrants so listed or approved, or any warrant or right to purchase or subscribe to any of the foregoing;

(h) (i) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association; and

(ii) any security issued by a corporation organized under Title 3, Chapter 1, and any security issued by a corporation to which the provisions of that chapter are made applicable by compliance with the requirements of Section 3-1-21;

(i) a promissory note, draft, bill of exchange, or banker's acceptance that evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, or a renewal of such an obligation that is likewise limited, or a guarantee of such an obligation or of a renewal:

(i) issued in denominations of at least \$50,000; and

(ii) either:

(A) receives a rating in one of the three highest rating categories from a nationally recognized statistical rating organization; or

(B) the issuer satisfies requirements established by rule or order of the division;

(j) any investment contract issued in connection with an employees' stock purchase, option, savings, pension, profit-sharing, or similar benefit plan;

(k) a security issued by an issuer registered as an open-end management investment company or unit investment trust under Section 8 of the Investment Company Act of 1940, if:

(i) (A) the issuer is advised by an investment adviser that is a depository institution exempt from registration under the Investment Advisers Act of 1940 or that is currently registered as an investment adviser, and has been registered, or is affiliated with an adviser that has been registered, as an investment adviser under the Investment Advisers Act of 1940 for at least three years next preceding



an offer or sale of a security claimed to be exempt under this subsection; and

(B) the adviser has acted, or is affiliated with an investment adviser that has acted as investment adviser to one or more registered investment companies or unit investment trusts for at least three years next preceding an offer or sale of a security claimed to be exempt under this subsection; or

(ii) the issuer has a sponsor that has at all times throughout the three years before an offer or sale of a security claimed to be exempt under this subsection sponsored one or more registered investment companies or unit investment trusts the aggregate total assets of which have exceeded \$100,000,000;

(iii) in addition to Subsection (i) or (ii), the division has received prior to any sale exempted herein:

(A) a notice of intention to sell which has been executed by the issuer which sets forth the name and address of the issuer and the title of the securities to be offered in this state; and

(B) a filing fee as determined under Section 61-1-18.4;

(iv) in the event any offer or sale of a security of an open-end management investment company is to be made more than 12 months after the date on which the notice and fee under Subsection (iii) is received by the director, another notice and payment of the applicable fee shall be required;

(v) for the purpose of this subsection, an investment adviser is affiliated with another investment adviser if it controls, is controlled by, or is under common control with the other investment adviser; and

(l) any security as to which the director, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(2) The following transactions are exempted from Sections 61-1-7 and 61-1-15:

(a) any isolated transaction, whether effected through a broker-dealer or not;

(b) any nonissuer transaction in an outstanding security, if as provided by rule of the division:

(i) information about the issuer of the security as required by the division is currently listed in a securities manual recognized by the division, and the listing is based upon such information as required by rule of the division; or

(ii) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security;

(c) any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy;

(d) any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(e) any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(f) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(g) any transaction executed by a bona fide pledgee without any purpose of evading this chapter;

(h) any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional investor, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(i) any offer or sale of a preorganization certificate or subscription if:

(i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber;

(ii) the number of subscribers acquiring any legal or beneficial interest therein does not exceed ten; and

(iii) there is no general advertising or solicitation in connection with the offer or sale;

(j) any transaction pursuant to an offer by an issuer of its securities to its existing securities holders, if:

(i) no commission or other remuneration, other than a standby commission is paid or given

directly or indirectly for soliciting any security holders in this state and the transaction constitutes either:

(A) the conversion of convertible securities;

(B) the exercise of nontransferable rights or warrants;

(C) the exercise of transferable rights or warrants if the rights or warrants are exercisable not more than 90 days after their issuance; or

(D) the purchase of securities under a preemptive right; and

(ii) the exemption created by Subsection (2)(j) is not available for an offer or sale of securities to existing securities holders who have acquired their securities from the issuer in a transaction in violation of Section 61-1-7;

(k) any offer, but not a sale, of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending;

(l) a distribution of securities as a dividend if the person distributing the dividend is the issuer of the securities distributed;

(m) any nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer or issuer files with the division, and the broker-dealer maintains in his records, and makes reasonably available upon request to any person expressing an interest in a proposed transaction in the security with the broker-dealer information prescribed by the division under its rules;

(n) any transactions not involving a public offering;

(o) any offer or sale of "condominium units" or "time period units" as those terms are defined in the Condominium Ownership Act, whether or not to be sold by installment contract, if the provisions of the Condominium Ownership Act, or if the units are located in another state, the condominium act of that state, the Utah Uniform Land Sales Practices Act, the Utah Timeshare and Camp Resort Act, and the Utah Uniform Consumer Credit Code are complied with;

(p) any transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets, if the consideration for which, in whole or in part, is the issuance of securities of a person or persons, and if:

(i) the transaction or series of transactions is incident to a vote of the securities holders of each person involved or by written consent or resolution of some or all of the securities holders of each

person involved;

(ii) the vote, consent, or resolution is given under a provision in:

(A) the applicable corporate statute or other controlling statute;

(B) the controlling articles of incorporation, trust indenture, deed of trust, or partnership agreement; or

(C) the controlling agreement among securities holders;

(iii) (A) one person involved in the transaction is required to file proxy or informational materials under Section 14 (a) or (c) of the Securities Exchange Act of 1934 or Section 20 of the Investment Company Act of 1940 and has so filed;

(B) one person involved in the transaction is an insurance company which is exempt from filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934, and has filed proxy or informational materials with the appropriate regulatory agency or official of its domiciliary state; or

(C) all persons involved in the transaction are exempt from filing under Section 12(g)(1) of the Securities Exchange Act of 1934, and file with the division such proxy or informational material as the division requires by rule;

(iv) the proxy or informational material is filed with the division and distributed to all securities holders entitled to vote in the transaction or series of transactions at least ten working days prior to any necessary vote by the securities holders or action on any necessary consent or resolution; and

(v) the division does not, by order, deny or revoke the exemption within ten working days after filing of the proxy or informational materials;

(q) any transaction pursuant to an offer to sell securities of an issuer if:

(i) the transaction is part of an issue in which there are not more than 15 purchasers in this state, other than those designated in Subsection (2)(h), during any 12 consecutive months;

(ii) no general solicitation or general advertising is used in connection with the offer to sell or sale of the securities;

(iii) no commission or other similar compensation is given, directly or indirectly, to a person other than a broker-dealer or agent licensed under this chapter, for soliciting a prospective purchaser in this state;

(iv) the seller reasonably believes that all the purchasers in this state are purchasing for investment;

(v) the transaction is part of an aggregate offering that does not exceed \$500,000, or a greater amount as prescribed by a division rule, during any 12 consecutive months; and

(vi) the director, as to a security or transaction, or a type of security or transaction, may withdraw or further condition this exemption or waive one or more of the conditions in Subsection (q);

(r) any transaction involving a commodity contract or commodity option; and

(s) any transaction as to which the division finds that registration is not necessary or appropriate for the protection of investors.

(3) Every person filing an exemption notice or application shall pay a filing fee as determined under Section 61-1-18.4.

(4) Upon approval by a majority of the Securities Advisory Board, the director, by means of an adjudicative proceeding conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act, may deny or revoke any exemption specified in Subsection (1)(g), (h), or (j) or in Subsection (2) with respect to:

(a) a specific security, transaction, or series of transactions; or

(b) any person or issuer, any affiliate or successor to a person or issuer, or any entity subsequently organized by or on behalf of a person or issuer generally and may impose a fine if he finds that the order is in the public interest and that:

(i) the application for or notice of exemption filed with the division is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(ii) any provision of this chapter, or any rule, order, or condition lawfully imposed under this chapter has been willfully violated in connection with the offering or exemption by:

(A) the person filing any application for or notice of exemption;

(B) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the application for or notice of exemption is directly or indirectly controlled by or acting for the issuer; or

(C) any underwriter;

(iii) the security for which the exemption is sought is the subject of an administrative stop order or similar order, or a permanent or temporary injunction or any court of competent jurisdiction entered under any other federal or state act applicable to the offering or exemption; the division may not institute a proceeding against an effective exemption under this subsection more than one year from the date of the order or injunction relied on, and it may not enter an order under this subsection on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section;

(iv) the issuer's enterprise or method of business includes or would include activities that are illegal where performed;

(v) the offering has worked, has tended to work, or would operate to work a fraud upon purchasers;

(vi) the offering has been or was made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options;

(vii) an exemption is sought for a security or transaction which is not eligible for the exemption; or

(viii) the proper filing fee, if required, has not been paid.

(5) (a) No order under Subsection (4) may operate retroactively.

(b) No person may be considered to have violated Section 61-1-7 or 61-1-15 by reason of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

History: As last amended by Chapter 160, § 6, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-5, R164-14, R164-18.

Cross-References: Condominium Ownership Act, § 57-8-1 et seq.; Utah Consumer Credit Code, Title 70C; Utah Timeshare and Camp Resort Act, Title 57, Chapter 19; Utah Uniform Land Sales Practices Act, § 57-11-1 et seq.

#### **61-1-14.5. Burden of proving exemption.**

In any proceeding under this chapter, civil, criminal, administrative, or judicial, the burden of proving an exemption under Section 61-1-14 or an exception from a definition under Section 61-1-13 is upon the person claiming the exemption or exception.

History: As enacted by Chapter 284, § 18, Law of Utah 1983.

#### **61-1-15. Filing of sales literature.**

The division may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of an investment adviser unless the security or transaction is exempted by Section 61-1-14 or is a federal covered security.

History: As last amended by Chapter 160, § 7, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-18.

#### **61-1-15.5. Federal covered securities.**

(1) The division by rule or order may require the filing of any of the following documents with respect to a covered security under Section 18(b)(2) of the Securities Act of 1933;

(a) Prior to the initial offer of federal covered security in this state, a notice form as prescribed by the division or all documents that are part of a federal registration statement filed with the U.S. Securities and Exchange Commission under the Securities Act of 1933, together with a consent to service of process signed by the issuer and a filing fee as determined under Section 61-1-18.4;

(b) After the initial offer of such federal covered security in this state, all documents that are part of an amendment to a federal registration statement filed with the U.S. Securities and Exchange Commission under the Securities Act of 1933, which shall be filed concurrently with the division;

(c) A report of the value of federal covered securities offered or sold in this state, together with a filing fee as determined under Section 61-1-18.4; and

(d) A notice filing under this section shall be effective for one year and shall be renewed annually in order to continue to offer or sell the federal covered securities for which the notice was filed.

(2) With respect to any security that is a covered security under Section 18(b)(4)(D) of the Securities Act of 1933, the division by rule or order may require the issuer to file a notice on SEC Form D and a consent to service of process signed by the issuer no later than 15 days after the first sale of such covered security in this state, together with a filing fee as determined under Section 61-1-18.4.

(3) The division by rule or order may require the filing of any document filed with the U.S. Securities and Exchange Commission under the Securities Act of 1933, with respect to a covered security under Section 18(b)(3) or (4) of the Securities Act of 1933, together with a filing fee as determined under Section 61-1-18.4.

(4) Upon approval by a majority of the Securities Advisory Board, the director, by means of

adjudicative proceedings conducted in accordance with Title 63, Chapter 46b, Administrative Procedures Act, may issue a stop order suspending the offer and sale of any federal covered security, except a covered security under Section 18(b)(1) of the Securities Act of 1933, if the director finds that the order is in the public interest and there is a failure to comply with any condition established under this section.

(5) The division by rule or order may waive any or all of the provisions of this section.

History: As enacted by Chapter 160, § 8, Laws of Utah 1997.

#### **61-1-16. False statements unlawful.**

It is unlawful for any person to make or cause to be made, in any document filed with the division or in any proceeding under this chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

History: As last amended by Chapter 284, § 20, Laws of Utah 1983.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-10.

Cross-References: Criminal Code, corporation frauds, § 76-10-701 et seq.

#### **61-1-17. No finding by division on merits - Contrary representation unlawful.**

(1) Neither the fact that an application for registration or a registration statement has been filed nor the fact that a person or security is effectively registered constitutes a finding by the division that any document filed under this chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the division has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(2) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with Subsection (1).

History: As last amended by Chapter 284, § 21, Laws of Utah 1983.

#### **61-1-18. Division of Securities established - Director - Appointment - Functions.**

(1) (a) There is established within the Department of Commerce a Division of Securities.

(b) The division shall be under the direction and control of a director, appointed by the executive director with the governor's approval.

(c) The director shall be responsible for the administration and enforcement of this chapter.

(d) The director shall hold office at the pleasure of the governor.



(2) The director, with the approval of the executive director, may employ such staff as necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Human Resource Management.

(3) An investigator employed pursuant to Subsection (2) who meets the training requirements of Subsection 53-13-105(3) may be designated a special function officer, as defined in Section 53-13-105, by the director, but is not eligible for retirement benefits under the Public Safety Employee's Retirement System.

History: As last amended by Chapter 145, Laws of Utah 2001.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-18.

Cross-References: Divisions created in Department of Commerce, § 13-1-2.

#### **61-1-18.1. Technical experts and specialists - Employment - Contracts.**

The director may employ or contract with technical experts and specialists including but not limited to certified public accountants, appraisers, engineers, and tax accountants to conduct or participate in any examination, audit, investigation or proceeding.

History: As last amended by Chapter 284, § 23, Laws of Utah 1983.

#### **61-1-18.2. Budget - Annual report.**

The director shall annually prepare and submit to the executive director:

(1) a budget for the expenses of the division for the administration and enforcement of this chapter for the next fiscal year; and

(2) a report outlining the division's work for the preceding fiscal year.

History: As last amended by Chapter 284, § 24, Laws of Utah 1983.

#### **61-1-18.3. Information obtained by division - Use for personal benefit prohibited - Disclosure.**

It is unlawful for any of the division's employees or any member of the Securities Advisory Board to use for personal benefit any non-public information which is filed with or obtained by the division. No provision of this chapter authorizes the division or any of its officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this chapter. No provision of this chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under subpoena directed to the division or any of its employees.

History: As last amended by Chapter 284, § 25, Laws of Utah 1983.

#### **61-1-18.4. Fees collected by division.**

The Division of Securities shall establish, charge, and collect fees pursuant to Section 63-38-3.2, except when it can be demonstrated that the fee amount should be based on factors other than cost, for the following:

(1) the fair and reasonable cost of any examination, audit, or investigation authorized or required by this chapter or other state law;

(2) certificate of serving and mailing process served upon the division in any action or proceeding commenced or prosecuted in this state against any person who has appointed the division its agent as provided in Subsection 61-1-26(7); and

(3) copies and authentication of all papers, publications, data, and other records available to the public or issued under the division's authority.

History: As last amended by Chapter 313, § 77, Laws of Utah 1994.

**61-1-18.5. Securities Advisory Board established - Appointment - Duties - Qualifications - Terms - Vacancies - Meetings - Conflicts of interest - Expenses.**

(1) (a) There is hereby established a Securities Advisory Board.

(b) Members of the board shall be appointed by the governor with the consent of the Senate.

(c) The board shall have the following duties:

(i) formulate and make recommendations to the director regarding policy and budgetary matters;

(ii) submit recommendations regarding registration requirements and division rules;

(iii) formulate and make recommendations to the director regarding the establishment of reasonable fees; and

(iv) generally act in an advisory capacity to the director with respect to the exercise of his duties, powers, and responsibilities.

(2) (a) The Securities Advisory Board shall be comprised of five members who shall be appointed in accordance with the following:

(i) two members from the securities brokerage community who have at least five years prior experience in securities matters;

(ii) one member from the securities section of the Utah Bar Association;

(iii) one member who is an officer or director of a corporation not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934; and

(iv) one member from the public at large who has no active participation in the securities business.

(b) No member may serve more than two consecutive terms.

(3) (a) Except as required by Subsection (3)(b), as terms of current board members expire, the governor shall appoint each new member or reappointed member to a four-year term.

(b) notwithstanding the requirements of Subsection (3)(a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of commission members are staggered so that approximately half of the board is appointed every two years.

(4) (a) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.

(b) All members shall serve until their respective successors are appointed and qualified.

(5) The board shall meet at least quarterly on a regular date to be fixed by the board and at such other times at the call of the director or any two members of the board. A majority of the board shall constitute a quorum for the transaction of business. Actions of the board shall require a vote of a majority of those present.

(6) Each member of the board shall, by sworn and written statement filed with the Department of Commerce and the lieutenant governor, disclose any position of employment or ownership interest that the member has with respect to any entity or business subject to the jurisdiction of the division. This statement shall be filed upon appointment and must be appropriately amended whenever significant changes occur in matters covered by the statement.

(7) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(b) Members may decline to receive per diem and expenses for their service.

History: As last amended by Chapter 176, Laws of Utah 2002.

#### **61-1-18.6. Procedures - Adjudicative proceedings.**

The Division of Securities shall comply with the procedures and requirements of Title 63, Chapter 46b, in its adjudicative proceedings.

History: As enacted by Chapter 161, § 235, Laws of Utah 1987.

#### **61-1-18.7. Funding of securities investor education and training.**

(1) There is created a restricted special revenue fund known as the "Securities Investor Education and Training Fund" to provide revenue for educating the public and the securities industry as provided in this section.

(2) All money received by the state by reason of civil penalties ordered and administrative fines collected pursuant to this chapter shall be deposited in the Securities Investor Education and Training Fund, and subject to the requirements of Title 51, Chapter 5, Funds Consolidation Act.

(3) The special revenue fund may include any fines collected by the division after July 1, 1989, pursuant to voluntary settlements or administrative orders.

(4) (a) The fund shall earn interest.

(b) All interest earned on fund monies shall be deposited into the fund.

(5) Notwithstanding Title 63, Chapter 38, Budgetary Procedures Act, the director may use special revenue fund monies, upon concurrence of the Securities Advisory Board and the executive director of the Department of Commerce, in a manner consistent with the duties of the division under this chapter and only for any or all of the following and the expense of providing them:

(a) education and training of Utah residents in matters concerning securities laws and investment decisions, by publications or presentations;

(b) education of registrants and licensees under this chapter, by:

(i) publication of this chapter and rules and policy statements and opinion letters of the division; and

(ii) sponsorship of seminars or meetings to educate registrants and licensees as to the requirements of this chapter; and

(c) investigation and litigation.

(6) If the balance in the fund exceeds \$100,000 at the close of any fiscal year, the excess shall be

transferred to the General Fund.

History: As enacted by Chapter 256, Laws of Utah 2002.

**61-1-19. Investigations authorized.**

(1) (a) The division in its discretion may make any public or private investigations within or without this state as it considers necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter or any rule or order hereunder.

(b) To aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder, the division may require or permit any person to file a statement in writing, under oath or otherwise as to all the facts and circumstances concerning the matter to be investigated.

(c) The division may publish information concerning any violation of this chapter or the violation of any rule or order hereunder.

(2) For the purpose of any investigation or proceeding under this chapter, the division or any employee designated by it may:

(a) administer oaths and affirmations;

(b) subpoena witnesses and compel their attendance;

(c) take evidence; and

(d) require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the investigation.

History: As last amended by Chapter 133, § 12, Laws of Utah 1990.

Cross-References: Contempt, Title 78, Chapter 32; Perjury, §§ 76-8-501 to 76-8-505.

**61-1-20. Enforcement.**

Whenever it appears to the director that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter, in addition to any specific powers granted in this chapter:

(1) (a) the director may issue an order directing the person to appear before the division and show cause why an order should not be issued directing the person to cease and desist from engaging in the act or practice, or doing any act in furtherance of the activity;

(b) the order to show cause shall state the reasons for the order and the date of the hearing;

(c) the director shall promptly serve a copy of the order to show cause upon each person named in the order;

(d) the director shall hold a hearing on the order to show cause no sooner than ten business days after the order is issued;

(e) after a hearing, the director may issue an order to cease and desist from engaging in any act or practice constituting a violation of this chapter or any rule or order under this chapter. The order shall be accompanied by written findings of fact and conclusions of law;

(f) the director may impose a fine; and

(g) the director may bar or suspend that person from associating with a licensed broker-dealer or investment adviser in this state.

(2) (a) The director may bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter;

(b) upon a proper showing in an action brought under this section, the court may:

(i) issue a permanent or temporary, prohibitory or mandatory injunction;

(ii) issue a restraining order or writ of mandamus;

(iii) enter a declaratory judgment;

(iv) appoint a receiver or conservator for the defendant or the defendant's assets;

(v) order disgorgement;

(vi) order rescission;

(vii) impose a fine of not more than \$500 for each violation of the act; and

(viii) enter any other relief the court considers just; and

(c) the court may not require the division to post a bond in an action brought under this subsection.

History: As last amended by Chapter 12, § 70, Laws of Utah 1994.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-14, R164-18.

**61-1-21. Penalties for violations.**

(1) A person is guilty of a third degree felony who willfully violates any provision of this chapter except Sections 61-1-1 and 61-1-16, or who willfully violates any rule or order under this chapter, or who willfully violates Section 61-1-16 knowing the statement made to be false or misleading in any material respect.

(2) A person who willfully violates Section 61-1-1:

(a) is guilty of a third degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than \$10,000;

(b) is guilty of a second degree felony if:

(i) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth \$10,000 or more; or

(ii) (A) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than \$10,000; and

(B) in connection with that violation, the violator knowingly accepted any money representing:

(I) equity in a person's home;

(II) a withdrawal from any individual retirement account; or

(III) a withdrawal from any qualified retirement plan as defined in the Internal Revenue Code; or

(c) is guilty of a second degree felony punishable by imprisonment for an indeterminate term of not less than three years or more than 15 years if:

(i) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth \$10,000 or more; and

(ii) in connection with that violation, the violator knowingly accepted any money representing:

(A) equity in a person's home;

(B) a withdrawal from any individual retirement account; or

(C) a withdrawal from any qualified retirement plan as defined in the Internal Revenue Code.

(3) No person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

(4) In addition to any other penalty for a criminal violation of this chapter, the sentencing judge may impose any penalty or remedy provided for in Subsection 61-1-20(2)(b).

History: As last amended by Chapter 149, Laws of Utah 2001.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R331-5.

#### **61-1-21.1. Limitation of prosecutions.**

(1) No indictment or information may be returned or civil complaint filed under this chapter more than five years after the alleged violation.

(2) As to causes of action arising from violations of this chapter, the limitation of prosecutions provided in this section supersedes the limitation of actions provided in Section 76-1-302 and Title 78, Chapter 12, Articles 1 and 2.

History: As last amended by Chapter 216, § 5, Laws of Utah 1992.

#### **61-1-21.5. Legal counsel - Prosecutions .**

(1) The attorney general shall advise and represent the division and its staff in all civil matters, administrative or judicial, requiring legal counsel or services in the exercise or defense of the division's power or the performance of its duties.

(2) With the concurrence of the attorney general, the staff of the division may represent the division in hearings conducted during the course of adjudicative proceedings of the division.

(3) In the prosecution of all criminal actions under this chapter, the attorney general, county attorney, or district attorney of the appropriate jurisdiction, shall provide all legal services for the division and its staff. The division may refer such evidence as is available concerning violations of this chapter to the attorney general or the appropriate county attorney or district attorney for criminal prosecution.

History: As last amended by Chapter 158, § 4, Laws of Utah 1993.

#### **61-1-22. Sales and purchases in violation - Remedies - Limitation of actions.**

(1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1), Section



61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used, any condition imposed under Subsection 61-1-10(4) or 61-1-11(7), or offers, sells, or purchases a security in violation of Subsection 61-1-1(2) is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.

(b) Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney's fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was reckless or intentional.

(3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4) (a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(b) There is contribution as in cases of contract among the several persons so liable.

(5) Any tender specified in this section may be made at any time before entry of judgment.

(6) A cause of action under this section survives the death of any person who might have been a plaintiff or defendant.

(7) (a) No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first.

(b) No person may sue under this section if:

(i) the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt; or

(ii) the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

(8) No person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(9) A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void.

(10) (a) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity.

(b) This chapter does not create any cause of action not specified in this section or Subsection 61-1-4(6).

History: As last amended by Chapter 13, Laws of Utah 1998.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R331-5.

#### **61-1-23. Review of orders.**

Any person aggrieved by a final order of the director determining all of the issues of an adjudicative proceeding may obtain review of the order by the executive director in accordance with Title 63, Chapter 46b, the Administrative Procedures Act.

History: As last amended by Chapter 133, § 16, Laws of Utah 1990.

#### **61-1-24. Rules, forms, and orders of division.**

(1) (a) The division may make, amend, and rescind rules, forms, and orders when necessary to carry out the provisions of this chapter.

(b) For the purpose of rules and forms, the division may classify securities, persons, and matters within its jurisdiction, and prescribe different requirements for different classes.

(2) (a) The division may not make, amend, or rescind any rule, form, or order unless it finds that the action is in the public interest, for the protection of investors, and consistent with the purposes of this

chapter.

(b) In prescribing rules and forms, the division may cooperate with the securities administrators of the other states and the Securities and Exchange Commission to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

(3) (a) The division may prescribe:

(i) the form and content of financial statements required under this chapter;

(ii) the circumstances under which consolidated financial statements shall be filed; and

(iii) whether or not any required financial statements shall be certified by independent public accountants.

(b) All financial statements shall be prepared in accordance with generally accepted accounting principles.

(4) All rules and forms of the division shall be published.

(5) No provision of this chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the division, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(6) The division may by rule classify specific acts as unlawful within the meaning of Sections 61-1-1 and 61-1-2 if it finds that the acts could operate as a fraud or part of a device, scheme, or artifice to defraud any person, and that the rule is not inconsistent with this chapter.

History: As last amended by Chapter 161, § 15, Laws of Utah 1991.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-1, R164-2, R164-4, R164-5, R164-6, R164-9, R164-10, R164-14, R164-18, R164-25.

#### **61-1-25. Record of registrations.**

(1) A document is filed when it is received by the division.

(2) The division shall keep a register of all applications for registration and registration statements which are or have ever been effective under this chapter and all denial, suspension, or revocation orders which may have been entered under this chapter. The register shall be open for public inspection.

(3) The information contained in or filed with any registration statement, application, or report may

be made available to the public under such rules as the division prescribes.

(4) Upon request and at such reasonable charges as it prescribes, the division shall furnish to any person photostatic or other copies, certified under seal if requested, of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(5) The division in its discretion may honor requests from interested persons for interpretative opinions.

History: As last amended by Chapter 284, § 35, Laws of Utah 1983.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-25.

**61-1-26. Scope of the act - Service of process.**

(1) Section 61-1-1, Subsection 61-1-3 (1), Sections 61-1-7, 61-1-15.5, 61-1-17, and 61-1-22 apply to persons who sell or offer to sell when:

- (a) an offer to sell is made in this state; or
- (b) an offer to buy is made and accepted in this state.

(2) Section 61-1-1, Subsection 61-1-3 (1), and Section 61-1-17 apply to persons who buy or offer to buy when:

- (a) an offer to buy is made in this state; or
- (b) an offer to sell is made and accepted in this state.

(3) For the purposes of this section, an offer to sell or to buy is made in this state whether or not either party is then present in this state, when the offer:

- (a) originates from this state; or
- (b) is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

(4) For the purposes of this section, an offer to sell or to buy is accepted in this state when acceptance:

- (a) is communicated to the offeror in this state; and

(b) has not previously been communicated to the offeror, orally or in writing, outside this state, and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(5) An offer to sell or to buy is not made in this state when:

(a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than 2/3 of its circulation outside this state during the past 12 months; or

(b) a radio or television program originating outside this state is received in this state.

(6) Section 61-1-2 and Subsection 61-1-3 (3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

(7) (a) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it prescribes by rule, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent.

(b) A person who has filed such a consent in connection with a previous registration or notice filing need not file another.

(c) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(8) (a) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or

the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

(b) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

History: As last amended by Chapter 160, §11, Laws of Utah 1997.

Administrative Rules: This section is cited in or interpreted by the following administrative rule(s): R164-26.

Cross-References: Corporations doing business in state to have resident agent, § 16-10a-1508.

#### **61-1-27. Construction of chapter.**

This chapter may be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

History: As last amended by Chapter 284, § 37, Laws of Utah 1983.

#### **61-1-28. Citation of chapter.**

This chapter may be cited as the Utah Uniform Securities Act.

History: As last amended by Chapter 284, § 38, Laws of Utah 1983.

#### **61-1-29. Savings clause.**

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application.

History: As last amended by Chapter 284, § 39, Laws of Utah 1983.

#### **61-1-30. Prior law repealed - Savings clause.**

(1) The Securities Act, Title 61, Chapter 1, Utah Code Annotated 1953, as amended by Chapter 129, Laws of Utah 1957, is hereby repealed except as saved in this section.

(2) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this chapter, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after the effective date of this chapter.

(3) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this chapter had not been passed. They are considered to have been filed, entered, or imposed under this chapter, but are governed by prior law.

(4) Prior law applies in respect of any offer or sale made within one year after the effective date of this chapter pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law.

(5) Judicial review of all administrative orders as to which review proceedings have not been instituted by the effective date of this chapter are governed by Section 61-1-23, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within 60 days after the effective date of this chapter.

History: As last amended by Chapter 284, § 40, Laws of Utah 1983.

**Sunset Act.** - See Section 63-55-261 for the repeal date of this chapter